IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 641 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

CHANDUBHAI JABARBHAI MALEK

Versus

RAMA VITHALBHAI

Appearance:

1. First Appeal No. 641 of 1985

MR JF SHAH for Petitioner No. 1

MS. TEJAL SHAH FOR MR PJ YAGNIK for Petitioner No. 1

MR MC BHATT for Respondent No. 1-2

MR ARUN H MEHTA for Respondent No. 3

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 09/05/2002

ORAL JUDGEMENT

1. Chandbhai Jabbarbhai Malek-appellant - original applicant has filed this First Appeal against the judgement and decree dated 31.8.1984 passed by the Motor Accident Claims Tribunal (Main), Ahmedabad City, in Motor Accident Claim Petition No. 55 of 1983. The learned judge by her impugned judgement has partly allowed the application of the applicant and directed that the applicant do recover from opponent Nos. 1 and 2 jointly and severally the sum of Rs. 20,060/- (rupees twenty thousand and sixty only) together with running interest at the rate of 6% per annum from the date of application till realisation of the amount by the applicant. It was further directed that the Oriental Fie and General Insurance Company Ltd. is liable to indemnify opponent No. 2 for the award amount together with costs and interest as awarded above which shall deposit the same in the Tribunal within a period of six weeks from the date of the order. It is further directed that out of the balance amount of Rs. 18,000/- (rupees eighteen thousand only) shall be invested in fixed deposit with any nationalised bank of the choice of the applicant for a period of five years.

2. The facts giving rise to this appeal are set out as under:

2.1 On 2.11.1982 at about 12 noon the appellant along with one Jagdipsing was going by motor cycle bearing registration No. GAC 6317 from Shahpur Gate via. income tax office towards Navrangpura. The motor cycle was driven by Jagdipsing and the appellant was a pillion rider at the relevant point of time. As soon as they reached near the railway crossing near the old High Court, at that time from the bye-lane nearby one ambassador car belonging to opponent No. 2 and driven by opponent No. 1 bearing registration No. GJP 2238 came and collided with the rear side left hand foot-rest portion of the motor cycle whereby both the applicant and the said Jagdipsing were thrown off and the applicant sustained fracture of tibia. After causing the impact, the first opponent took the applicant to the bone-setter but as the bone-setter informed that this is a case to be admitted in the hospital. Immediately he was taken to the Civil Hospital where he was admitted as an indoor patient for further treatment. At the time when the accident took place the applicant was serving in Ahmedabad Municipal Corporation as an electrician and earning Rs. 800/- per month. After being admitted in the hospital a rod was inserted in his left leg and the plaster-cast was applied. He has further stated that he

has spent approximately Rs. 1000/- for medicines, special diet and conveyance. The applicant has therefore claimed a sum of Rs. 75,000/- (rupees seventy five thousand) from the opponents as compensation for the injuries sustained and suffered by him.

2.2 Opponent No. 1 though served and filed appearance through his advocate, has not filed any written statement before trial court. Opponent No. 2 has filed its written statement vide Exh. 11. They have contested the version of the accident, the consequential injuries sustained and suffered by the applicant, economic loss caused to the applicant and the damages claimed by the applicant. They disputed the date of birth of the applicant. According to them it is the applicant and the motor cycle rider who have contributed to the causing of the impact. At the time when the impact occurred their motor car had fully come on to the road and because the motor cycle came rushing, dashed with the car and caused the impact, hence they are not liable to answer any claim. They have further stated that the claim launched by the applicant is on the high scale and as no break up is given by the applicant, the petition is not maintainable. Opponent No. 2 submitted that the application deserves to be dismissed.

2.3 The Insurance Company of the offending vehicle is served with the notice under Section 96(2) of the Motor Vehicles Act and it has filed appearance through advocate and has contested the application by filing its written statement Exh. 24. They have contended that the version of the accident given by the applicant is not acceptable and consequently the economic loss suffered by the applicant could not be accepted. Looking to the limited defence available to the Insurance Company and since the defence on facts being not available to them, the same has not been narrated.

3. The learned trial judge has considered the documentary evidence i.e. exh. 32 a copy of the panchnama, exh. 33 certified copy of the complaint, exh. 34 leave note of the applicant issued by Dudheshwar Water Works of Ahmedabad Municipal Corporation from the period 3.11.1982 to 8.3.1983, exh. 35 injury certificate issued by V.S. Hospital, exh. 41 disability certificate issued by Dr. P.M. Vekaria, exh. 42 X-rays of the applicant, exh. 31 criminal court judgement dated 28.3.1984 where the driver opponent No. 1 pleaded guilty, exh. 45 certificate showing monthly salary of rs. 1007/-, exh. 46 pay certificate of the Corporation in favour of the applicant. As regards oral evidence of the applicant, he

has examined himself vide exh. 36, the driver of the motor cycle Jagdipsing has been examined at exh. 43 and Dr. Prakash Muljibhai Vekaria has been examined vide exh. 40. Opponents had not led any oral or documentary evidence in support of their contentions.

4. In view of the aforesaid aspect the learned trial judge by her impugned judgement held that the applicant proved that he has suffered and sustained injuries due to rash and negligent driving by opponent No. 1. The learned judge further held that opponent No. 2 failed to prove that the applicant being guilty of contributory negligence is not entitled to claim compensation. The learned judge has held that the applicant is entitled to compensation of Rs. 20,060/- (rupees twenty thousand and sixty only) from opponent and the insurer.

5. Being aggrieved and dissatisfied with the aforesaid judgement of the learned judge, the appellant-original claimant herein filed appeal under Section 110D of the Motor Vehicles Act. On behalf of the appellant Ms. Tejal Shah, learned advocate for Mr. P.J. Yagnik appeared. The learned counsel for the appellant submitted that looking to the injury certificate and the evidence which has been produced before the tribunal that the appellant had suffered fracture of fibula and tibia and had to remain on plaster on his left leg for a period of five months and that even thereafter for a period of two months the appellant could move only with the help of crutches. It was submitted that because of injury the appellant would find it difficult to walk longer distances and on uneven surfaces. Even the appellant had difficulty in standing for long time and in climbing stairs. In view of the same, it was submitted that the learned judge ought to have awarded Rs. 15,000/- (rupees fifteen thousand only) on account of pain, shock and sufferings. The learned counsel for the appellant has further submitted that the appellant had to spend his leave because of the tortious act of the opponents and that the appellant could have encashed his leave but for the accident. It is further submitted that the Tribunal has erred in allowing the tortfeasor to escape his liability on the ground that the employer of the appellant paid him salary. It was submitted that the appellant was on leave for five months from 3.11.1982 to 8.3.1983 and the tribunal ought to have awarded Rs. 5000/- (rupees five thousand) as loss of earning during treatment at the rate of Rs. 1000/- (rupees one thousand) per month. It was further submitted that the tribunal has erred in assessing the future economic loss on the basis of monthly salary of Rs. 900/- (nine

hundred). It was submitted that the tribunal did not appreciate the salary certificate produced by the appellant from Ahmedabad Municipal Corporation which showed that the appellant was receiving Rs. 1007.20 ps. as monthly salary. It was further submitted that the Tribunal has committed error in assessing the reduction in efficiency loss or earning capacity at 10% equivalent to permanent disability. It was submitted that the tribunal ought to have appreciated that the future loss of income was not always coextensive with the extent of permanent disability and in estimating the future loss of income the primary consideration must be the importance of the affected limb in the vocation, profession or employment of the injured person and the potential value of the claimant in the market. The learned counsel for the appellant further submitted that the learned judge has fixed age of the appellant at 53 years. From the evidence on record, the learned judge ought to have considered the age of the appellant at 49 years. In view of the same, the learned counsel for the appellant submitted that the tribunal ought to have awarded Rs. 40,000/- (rupees forty thousand) as compensation instead of Rs. 20,000/- (rupees twenty thousand).

6. Originally the appellant's claim in the claim petition was for Rs. 75,000/- (rupees seventy five thousand) but in appeal the appellant has reduced its claim to Rs. 40,000/- (rupees forty thousand).

7. On behalf of the Insurance Company Mr. A.H. Mehta, learned advocate, appeared and has tried to support the judgement of the tribunal in this behalf.

8. I have considered the judgement of the learned tribunal judge and also evidence on record. Looking to the injury suffered by the claimant, medical evidence produced and the fact that the appellant had a fracture of fibula and tibia and to remain on plaster on his left leg for a period of five months and looking to the long treatment undergone by the appellant it was clear that the appellant must have undergone exertion of pain, shock and agony. He is engaged as electrician wherein the movements of his affected leg is involved. Thus on head of pain, shock and suffering, in my opinion, a sum of Rs. 20,000/- (rupees twenty thousand) would be reasonable and that can be awarded to him in this behalf. I, therefore, award Rs. 20,000/- (rupees twenty thousand) instead of Rs. 10,000/- (rupees ten thousand) as awarded by the tribunal.

8.1 The tribunal held that though the appellant had ten percent permanent disability, it would certainly affect adversely his earning capacity to that extent. Thus the monthly loss of the appellant in future would be Rs. 90/- i.e. 10% of salary of Rs. 900/- per month (yearly loss of Rs. 1080/-). The appellant produced salary certificate from Ahmedabad Municipal Corporation wherein the salary of the appellant was shown at Rs. 1007.20ps. So 10% thereof (of Rs. 1007/-) would be Rs. 100/- (i.e. yearly loss of Rs. 1200/-). It may be noted that the learned judge has fixed the age of the appellant at 53 years. The learned judge has considered the said age on the ground that the appellant joined services in the year 1956 when he was aged 25 years and therefore on the date of deposition he is more than 53 years of age and hence age should be fixed at 53 years and not 47 years. The learned counsel for the appellant has seriously assailed this finding of the learned judge. The learned counsel for the appellant has taken me to the entire evidence on record and I have myself checked the evidence available on record. I have considered the statement of Janbhai Jalarbhai who has seen the accident and who is also working with the Municipality. The claimant also himself examined before the Tribunal. He stated that he was aged 49 years and the same was recorded in the ration card. The same been produced before this court. In view of the same, I rely on the ration card and the deposition of the claimant. I, therefore, fix the age of the appellant at 49 years instead of 53 years as fixed by the Tribunal. In view of this fact, if I consider that the appellant could have worked upto 60 years, the appellant would have worked for 11 more years and considering this fact, future economic loss would come to Rs. 13,200/(Rs. 1200/- per year multiplied by 11).

9. In view of the same the appellant would be entitled to additional compensation of Rs. 10,000/under the head pain, shock and suffering and additional amount of Rs. 5,640/- (Rs. 13,200/- minus Rs. 7,560/-) under the head of future economic loss. It may be noted that in this case the accident has occurred on 2.11.1982. The Tribunal has given award on 31.8.1984 and the appeal against the order of the Tribunal is decided by me today i.e. 9.5.2002. In view of the same, the appellant is entitled to interest at the rate of 9% on the additional amount from the date of the award till realisation. To the above extent, the order of the Tribunal is modified and the other conditions of the order of the tribunal remain unchanged.

10. In the result the appeal is partly allowed.

(K.M. MEHTA, J)

(pkn)